

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
APPELLATE DIVISION
CIVIL APPEAL NO. E787 OF 2023

RADHESHYAM TRANSPORT LIMITED.....1st APPELLANT
CALIB ONGADI.....2nd APPELLANT

VERSUS

MICHEAL MWANGI NGANGA.....RESPONDENT

**(BEING AN APPEAL FROM THE JUDGMENT/DECREE OF THE HON C.K CHEPTOO-
PRINCIPAL MAGISTRATE DATED 19th JANAUARY 2024, DELEIVERED IN
MILLIMANI CMCC CASE NO E11965 OF 2021)**

ARISING BETWEEN
REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE COURT AT NAIROBI
CIVIL SUIT NO E11965 OF 2021

MICHEAL MWANGI NGANGA.....
.....PLAINTIFF

VERSUS

RADHESHYAM TRANSPORT LTD..... 1st
DEFENDANT
CALIB ONGADI.....2nd
DEFENDANT

J U D G M E N T

A. Introduction

- 1.** The respondent initiated this claim by filing his plaint dated 10th June 2021, where he averred that the 1st Appellant was the registered, beneficial and/or insured owner of motor vehicle registration number **KCB 323Q-TATA LORRY (hereinafter referred to as the 1st suit Motor vehicle)** while the 2nd appellant was the 1st appellants lawful driver, agent and/or employee driving the aforestated motor vehicle. That on 21st December 2020, while lawfully walking off the road along Easter by pass, the 2nd respondent did recklessly and carelessly drive the said suit motor vehicle at very high speed and caused it to lose control and crush into him thereby causing him to suffer serious bodily injuries. The respondent particularized the injuries suffered and urged the court to compensate him.
- 2.** The appellants did file their statement of defence and denied the occurrence of the alleged accident on the date, time, place and/or in the manner referred to by the respondent or at any other time and put the respondent to strict proof thereof. In the alternative if an accident did occur, the same was caused by the negligence of the driver of Motor vehicle registration

Number **KBQ 165Y (hereinafter referred to as the 2nd suit motor vehicle)** and not driver of the first suit motor vehicle. The appellants further denied all the particulars of injuries and damages claimed and put the respondent to strict proof thereof. The appellants did file an application to enjoin the owner/driver of the 2nd suit motor vehicle to the proceedings but they did abandon the said application, without prosecuting the same.

B. Facts at Trial

- 3.** The respondent testified and stated that on the material day he was walking off the Eastern bypass road, when the 2nd appellant lost control of the 1st suit motor vehicle, veered off the road and crushed into him, thereby causing him to suffer serious bodily injuries as pleaded in the plaint. In support thereof he produced his claim supporting documents and urged the court to compensate him for the injuries suffered and treatment expenses incurred. In cross examination he confirmed that the accident occurred, when the 1st suit motor vehicle had a tire burst causing it to loss control and veered off the road, where it hit him.
- 4.** PC Jackline Naeku, attached to Embakasi police station, traffic department presented the police abstract and confirmed that the accident occurred on 21.12.2020 at about 18.53hrs, involving both suit motor vehicles, the respondent who was

walking along the road, and **Motor cycle registration Number KMDK 441 boxer**. She was assigned to investigate the said accident and concluded that it was the 1st suit motor vehicle to blame for the said accident.

5. Under cross examination, she confirmed that she did not visit the accident scene on the material night but did so on the following day. She also confirmed that the 1st suit motor vehicle was towing the 2nd suit motor vehicle, when the said accident occurred. PW3 Dr George Mwaura confirmed that he did examine the respondent and prepared his medical report dated 30.05.2021. As a result of the said accident, the respondent had suffered laceration and swelling on the left ankle, compound (open) fractures on the left medial and lateral malleoli (ankle fractures), and injury to his left shoulder. He classified the said injuries as grievous harm, with permanent degree of incapacity assessed at 10%.
6. In defence the 2nd appellant stated that he was an employee of the 1st defendant and confirmed that on the material day, he was assigned to tow the 2nd suit motor vehicle, which had stalled along Manyanja road. He proceeded to do so and while enroute back the towing line broke and the said driver continued to steer the 2nd suit motor vehicle past the 1st suit motor vehicle and it lost control and hit a motor cycle parked off the road and also a pedestrian walking off the road. He

produced his driving license and a copy of the police abstract dated 04.01.2021 to support his contention.

7. The trial court did consider the pleadings, evidence adduced and submissions filed and did find that the respondent had proved his case and proceeded to award him **Kshs.1,517,000/=** as General/Special damages plus costs of the suit.
8. Being dissatisfied and aggrieved by the said award the appellants filed their memorandum of appeal raising four (4) grounds of appeal, namely;
 - a) ***That the learned Magistrate erred in law and in fact in finding that the Appellants are 100% liable for negligence.***
 - b) ***That the learned Magistrate erred in law and in fact in failing to analyze the evidence as regard liability.***
 - c) ***That the learned Magistrate erred in law and in fact in disregarding the Appellants submissions and in so doing gave an award for general damages that were inordinately high in the circumstance.***

9. The Appellant thus urged the court to set aside the judgment on liability and be pleased to reassess quantum to reasonable levels.

C. Analysis and Determination

10. I have considered this appeal, submissions, and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial, and this court, as the first appellate court, must re-evaluate, re-analyze, and re-consider the evidence afresh and draw its conclusions on it. The court should, however, bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see **Selle v Associated Motor Boat Co Ltd & Others [1968] EA 123**) & **Peters Vs Sunday Post Limited (1968) EA 123.**

11. A first appellate court is also the final court of fact, and litigants are entitled to full, fair, independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of **Section 78 of the Civil Procedure Act**, a court of first appeal can appreciate the entire evidence and come to a different conclusion. See **Kurian Chacko Vs Varkey Ouseph AIR 1969 Kerala 316.**

12. In this Appeal, the Appellants are challenging the trial's court finding on liability. In **Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142 and Mahendra M Malde vs. George M Angira Civil Appeal No. 12 of 1981**, it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

13. In their submissions the appellants urged the court to find that in view of the two police abstracts blaming different motor vehicles for the accident, liability was not proved and that the trial magistrate erred in shifting the said burden on them instead letting the respondent to prove his case as provided for under **Section 107 of the Evidence Act, Cap 80 Laws of Kenya**. They further emphasized that the respondent's evidence was not corroborated by any independent witness as PW2 had stated that she did not know which motor vehicle hit the respondent. They thus reiterated that the burden of proof was not discharged and urged the court to set aside the trial courts finding on liability.

14. The respondent on the other hand urged the court to uphold the trial Magistrate finding on liability as the respondent had seen the motor vehicle that hit him, and secondly urged the court to note that the appellants had failed to bring 3rd party proceedings against the owner of the 2nd suit

motor vehicle and therefore could not expect to have a determination on liability made against them since they were not a party to the suit.

- 15.** The respondent confirmed that it was the 1st suit motor vehicle that veered off the road after a tire burst and hit him, while he was walking off the Eastern by pass road. PW1 PC Jackline Naeku, who investigated the said accident also arrived at the said conclusion. In her evidence before court, she confirmed that, ***“The motor vehicle KCB 323Q hit the plaintiff herein. I concluded that from the information in the initial report and from the witnesses at the scene.”***
- 16.** Based on the forgoing, i do find that the respondent adequately proved his case that it was the 1st suit motor vehicle that crashed him and caused him to suffer grievous harm. PW1 by her testimony also confirmed that the content of the 1st police abstract was accurate and therefore the trial Magistrate, did not err in holding that the appellants were 100% liable for the said accident and their appeal against liability fails.
- 17.** On quantum, in ***Woodruff vs. Dupont [1964] EA 404*** it was held by the East African court of appeal that:
- “The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides.***

When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are “such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself.” The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant.”

18. In Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 , the Court of

Appeal further set out the circumstances under which an

appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

- 19.** As a result of this accident, the respondent sustained compound (open) fractures on the left medial and lateral malleoli (ankle fractures) and lacerations on his left shoulder and was awarded ***Kshs.1,500,000/= (One million, Five hundred thousand only)***. I have perused the authorities relied on by both parties herein. I am alive to the fact that no two injuries can be exactly the same. However, I find the authorities relied on by the respondent herein are far more comparable to the injuries he sustained.

20. The Appellant has therefore not proved that the trial court erred in her estimation of the damages, based the award on wrong principles or that she misapprehended the evidence in some material aspect. There is therefore no basis upon which this court can interfere with the damages as awarded as the same was proportional and reflected the trend of previous, recent, and comparable awards.

D. Disposition

- 21.** Having exhaustively analyzed all the issues raised in this appeal I find that the same has no merit and dismiss the same with costs to the Respondent.
- 22.** The Costs herein are assessed at **Kshs.200,000/=** all inclusive.
- 23.** It is so ordered.

Dated, signed, and delivered in open court at **MARSABIT** this **18th** day of **MARCH, 2026**.

FRANCIS RAYOLA OLEL
JUDGE

Delivered on the virtual platform, Team this **18th** day of **MARCH, 2026.**

In the presence of: -

N/A.....Appellant

N/A..... Respondent

MR. JARSO..... Court Assistant

ORIGINAL